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No. 06-1204

FILED
MAR 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,
Petitioners,

v.

MARIANO J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent and his *amici* advocate a regime that is guaranteed to produce inequitable and inefficient results. They insist that the district court properly resolved competing claims to the Arelma assets in the absence of the Republic, one of the principal claimants. They add that, although the Republic "technically" would not be bound by this judgment, the award of the assets to respondent "would nonetheless resolve this controversy as a practical matter" and "cannot be undone." *Amicus* Merrill Lynch ("Merrill") Br. 29, 30. If they are right in this, the inconsistency of the outcome they propose with principles of sovereign immunity is manifest, as property that always has been owned by the Republic will be handed over to third parties. And if they are wrong and the Republic subsequently *could* bring a successful suit for this same property against Merrill, the result would be duplicative litigation and duplicative liability for Merrill. Either way, the outcome would be profoundly unfair to someone—which is precisely what Rule 19 was designed to avoid.

And that is not the end of the mischief that would be caused by the approach advanced by respondent and his *amici*. They do not deny that their rule is inconsistent with the international consensus, accepted by the United States, that stolen assets should be returned to the nation of origin. They accept that their proposed outcome would interfere with the Republic's effort to have its courts settle the ownership of assets that, it believes, were stolen by its former President. And in all of this, they put the cart before the horse: they insist that respondent's asserted interest in the Arelma assets must be protected, even though his interest is entirely derivative

of any rights in those assets held by the Marcos estate and the Sandiganbayan is, at this moment, considering whether those assets always have belonged to the Republic and *not* to the estate. Because *that* proceeding should resolve ownership of the Arelma assets, and because any litigation in this country concerning those assets should follow the Sandiganbayan's ruling, the decision below should be reversed.

A. The Rule 19 Question Was Properly Brought Before The Court Of Appeals And This Court.

1. PNB and Arelma have the right to present the Rule 19 issue.

Respondent offers no serious response to the argument that PNB and Arelma properly brought the Rule 19 issue before the Ninth Circuit and to this Court. Respondent argues only that PNB and Arelma, lack standing, or that the case has become moot as to them, because they did not seek certiorari to challenge the award of Arelma's funds to respondent on the merits. Resp. Br. 32–34. This contention is insubstantial.

PNB and Arelma consistently have expressed one interest in this litigation: they requested that "all assets in the [disputed] Account * * * should be awarded to Arelma and delivered to PNB, as Arelma's shareholder and as escrow holder, *to be held in escrow by PNB pursuant to the order of the Swiss government and its duties as escrow holder.*" Arelma/PNB CA9 E.R. 76 (emphasis added). From the outset, they sought to vindicate this interest through dismissal of the interpleader action under Rule 19(b). See Pet. Br. 8–9 n.7, 18–19. When the

district court, having denied the Rule 19 motion to dismiss, ultimately ruled against PNB and Arelma on the merits, they plainly were aggrieved by the Rule 19 determination and sought to remedy their injury by appealing that ruling (see Pet. Br. 9 n.8) and then by seeking certiorari on that question in this Court. If PNB and Arelma prevail on the Rule 19 issue here, the judgment against them will be set aside, their injury (*i.e.*, the award of the assets to respondent) will be wholly redressed, and the Arelma assets will be available for distribution according to the outcome of the proceedings in the Philippines—as PNB and Arelma have at all times sought. There can be no doubt that, as aggrieved parties whose injury would be thus redressed by success in the litigation, they have standing to pursue their current Rule 19 claim in this Court.

Respondent's argument to the contrary turns entirely on the assertion that PNB and Arelma lack standing because they "suffered no injury from the denial of their Rule 19(b) motion" and have no further interest in the litigation because they did not, in this Court, "challenge the denial of their claims to the Arelma assets on the merits." Resp. Br. 31. But this assertion has no foundation. PNB and Arelma take the position that they have a right (and, indeed, a legal obligation under PNB's escrow agreement) to dispose of the Arelma assets in accord with the judgment of a Philippine court. Insofar as standing is concerned, that they now seek to accomplish this result through dismissal of the interpleader under Rule 19(b) rather than through a ruling on the merits is wholly immaterial.

Not surprisingly, the Court has rejected the very contention respondent advances here: that Article

III requires parties to "demonstrate a connection between the injuries they claim and the * * * rights being asserted." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978). Indeed, in addressing appellate standing, the Court has held that a party adversely affected by a judgment may appeal on procedural grounds to remedy a continuing injury even when it may not appeal the merits. See *Deposit Guaranty Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 334 n.6 (1980). Because PNB and Arelma accordingly have standing—and because respondent concedes that appellate courts must address the question of indispensability so long as there is standing (Resp. Br. 35)—the Rule 19(b) question is properly before this Court.[1]

2. The Republic also was entitled to appeal and seek review in this Court.

The Court therefore need not reach the appealability question it posed to the parties. If it does, however, it should hold that the Republic did have the right to appeal and to seek review in this Court

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[1] The cases cited by respondent (Resp. Br. 33–34) in fact demonstrate why PNB and Arelma are parties to a live controversy. In *Ashcroft* v. *Mattis*, 431 U.S. 171, 172–173 (1977) (per curiam), the Court held that the court of appeals was without jurisdiction to review the denial of a declaratory judgment where the plaintiff, who had abandoned a claim for money damages, had no remaining injury that could be redressed by further judicial action. But here, if PNB and Arelma prevail, their injury—the award of the Arelma assets to respondent—will be remedied. Similarly, in *Horizon Bank & Trust Co.* v. *Massachusetts*, 391 F.3d 48, 54 (1st Cir. 2004), the First Circuit refused to consider a Rule 19 appeal only after Massachusetts conceded that its interests were inferior to those of the United States and another creditor and that it stood no chance of recovering on its claim.

on the Rule 19(b) question. In arguing to the contrary, respondent simply disregards the considerations that are controlling here: that the Republic *was* a party, sought dismissal of itself *and* of the case, received only half of the relief sought—and, to protect its interests, still needs the relief it originally requested and was denied by the district court. If, in these circumstances, the Republic may not appeal, its sovereign immunity will be drained of much of its practical value and the recognition of its immunity actually will leave it substantially worse off than when it began.

In challenging the Republic's right to appeal, respondent's principal contention is that the Republic should have intervened in the case. Resp. Br. 24–30. But this suggestion is nonsensical. The Republic was not a stranger to the litigation; it had been a party and, in that capacity, had sought relief from the district court. Respondent evidently is of the view that, because the half of the requested relief that the Republic obtained was dismissal of itself from the litigation, it was obligated to intervene so that—having just been dismissed—it could then rejoin the suit for purposes of appeal. To say the least, this would be a bizarre requirement.

And that would be especially so if, as respondent indicates (Resp. Br. 24), the Republic could have intervened without surrendering its immunity. Such limited intervention, which would not have made the Republic "a full participant" that was "vulnerable to complete adjudication" (*Schneider* v. *Dunbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985)), would have amounted to a meaningless formality. Typically, "the possibility that the plaintiff will be able to obtain relief against the intervenor-defendant

is part of the price paid for intervention." *Ibid.* (citation and internal quotation marks omitted). But that would not have been the case here. Accordingly, there would have been absolutely no practical consequence to requiring intervention by the Republic. Cf. *Devlin* v. *Scardelletti*, 536 U.S. 1, 12 (2002) ("Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the Government's suggested [intervention] requirement.").[2]

Respondent gets no further with his argument (Resp. Br. 21–24) that, although the Republic requested the relief that is now the subject of this proceeding when it was first before the district court and initially appealed to the Ninth Circuit, it lost its right to appeal when it did not participate in subse-

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[2] *South Carolina* v. *Wesley*, 155 U.S. 542 (1895), and *Georgia v. Jesup*, 106 U.S. 458 (1882), cited by respondent (at Br. 27–28), are inapposite here. *Wesley* involved what the Court described as an irregular proceeding in which the State filed a writ of error to challenge the resolution of a land dispute between parties who were "sued as individuals" but had some association with the State. 155 U.S. at 545. Unlike the Republic here, the State in *Wesley* did not participate as a party in the trial court, and its claim was not that the State itself was an indispensable party. In *Jesup*, the Court, on Georgia's appeal, affirmed a judgment in a private foreclosure suit to which the State was not a party. In so doing, the Court made clear that the State lacked the right to pursue an appeal because it was not prejudiced by the decision below: "In no legal sense has the state been injured by the order dismissing its petition." 106 U.S. at 464. The Court added that, as to the part of the judgment that was adverse to the State, "[i]f the state, not being a party to the suit, could have appealed therefrom, it has not done so." *Ibid.*

quent remand proceedings. The Republic's absence from the remand hardly made it "untenable" for the district court to decide the Rule 19(b) question, as respondent now suggests (Resp. Br. 27); courts (at both the district court and the appellate levels) routinely decide the Rule 19 status of absent parties. See Pet. Br. 18–19. And the Republic did not use its "immunity as both a shield and a sword" (Resp. Br. 27) by failing to press the case for Rule 19 dismissal after the Ninth Circuit remand. The only party that could have been prejudiced by that failure was the Republic itself, which lost the opportunity to offer additional support for its position.

One way to view the problem here is to consider the outcome had the district court simultaneously granted the Republic's motion to dismiss it from the suit on sovereign immunity grounds and denied its motion to dismiss the action under Rule 19(b). In such circumstances, it would be a bizarre and "self-defeating judicial construction" (*DiBella* v. *United States*, 369 U.S. 121, 126 (1962)) to hold either that the Republic was precluded from immediately appealing the denial of its motion to dismiss the action or that it had to ask to be let back into the suit so that it could appeal. Yet the situation here, although more convoluted procedurally (because the Ninth Circuit in the initial appeal stayed rather than dismissed the action and the district court vacated the stay on remand rather than await the Sandiganbayan's decision), is identical in principle: the court denied essential relief to a party that was then dismissed from the case. In such circumstances, where the denial of the Republic's Rule 19 motion "amounted to a 'final decision of [its] right" not to have the case go forward (*Devlin*, 536 U.S. at 9), nothing in this Court's doctrine precludes an appeal.

B. This Action Should Not Proceed In The Absence Of A Necessary Sovereign.

In our opening brief, we explain that the Republic's sovereign immunity is itself a "compelling" consideration that requires dismissal of this suit under Rule 19(b). *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118–119 (1968). See Pet. Br. 27–36. Our brief (at 31–33) points to decisions of this and other courts applying that principle to hold that suit must be dismissed when a sovereign is a necessary party because a sovereign's interest in property "cannot be tried 'behind its back.'" *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945). Respondent and his *amici* make virtually no response to this point: they do not deny that the holding below effectively vitiated the Republic's immunity and they do not cite, let alone attempt to distinguish, this authority.

The arguments they do make to discount the import of the Republic's immunity are unavailing. Respondent contends principally that decisions involving the States and the United States are inapplicable to foreign sovereigns because (assertedly in contrast with the domestic context) there are no "alternative means" in this country to resolve disputes with foreign governments. Resp. Br. 50; see *id.* at 46–47. But there also were no alternative remedies available in any of the decisions cited in our opening brief that held domestic sovereigns indispensable; indeed, some of those decisions specifically noted the *unavailability* of adequate alternative remedies but nevertheless held "dismissal of the suit * * * mandated by the policy of immunity." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986). On the other hand, so far as Rule 19(b) is

concerned, adequate alternative remedies are no *less* available when foreign than when domestic sovereigns are involved: under Rule 19(b), "[t]here is no guaranty that the plaintiff can proceed in a court in the United States. The preferred alternative forum may be in a foreign country." 4 J. Moore *et al.*, *Moore's Federal Practice* § 19.05[5][b], at 19-103 (3d ed. 2007) (citing cases). And the foreign policy implications of suits impinging upon the interests of other countries means that the immunity of foreign sovereigns is, if anything, entitled to *greater* protection than that of their domestic counterparts. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446 (1979) (more searching inquiry required under the Foreign than the Interstate Commerce Clause).

Respondent also contends that, even in the domestic context, "[n]umerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties." Resp. Br. 46 n.20; see *id.* at 47–50. But this assertion, too, misses the mark: respondent cannot point to *any* decision holding that a sovereign found to be "necessary" in a suit with private litigants was not also indispensable, and we are not aware of one.[3]

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[3] Although respondent alludes to "[n]umerous cases," he mentions only two. In one of them, the sovereign Indian tribe was not "necessary" at all under Rule 19(a) because the United States appeared to defend the Tribe's interests (*Artichoke Joe's* v. *Norton*, 216 F. Supp. 2d 1084, 1118–1119 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th Cir. 2003)); in the other, a New York state court applied its own joinder law, which differs in its terms from Rule 19(b) (*Saratoga County Chamber of Commerce, Inc.* v. *Pataki*, 798 N.E.2d 1047, 1058–1059 & n.9 (N.Y. 2003)). Other decisions cited by respondent for the proposition that courts allow claims to proceed in the absence of sovereigns are wholly off point. Some involved tribes

that were not necessary parties because the United States participated in the litigation and protected their interests. *Kansas* v. *United States*, 249 F.3d 1213, 1225–1227 (10th Cir. 2001); *Sac & Fox Nation of Mo.* v. *Norton*, 240 F.3d 1250, 1258–1260 (10th Cir. 2001). In others, litigation would not prejudice the absent party. *United States ex rel. Steele* v. *Turn Key Gaming, Inc.*, 135 F.3d 1249, 1252 (8th Cir. 1998); *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997); *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456, 458 (10th Cir. 1952) (employing common-law definition of indispensability); *Wyandotte Nation* v. *City of Kan. City*, 200 F. Supp. 2d 1279, 1296 (D. Kan. 2002); *Narragansett Tribe of Indians* v. *S. R.I. Land Dev. Corp.*, 418 F. Supp. 798, 811–813 & n.5 (D.R.I. 1976). One decision was made in state court and relied upon the state constitution. *Dairyland Greyhound Park, Inc.* v. *McCallum*, 655 N.W.2d 474, 486–487 (Wis. Ct. App. 2002). Another did not involve a sovereign at all. *Imperial Appliance Corp.* v. *Hamilton Mfg. Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967). And a final case *was*, in fact, dismissed for nonjoinder of an indispensable party. *Davis* v. *United States*, 343 F.3d 1282, 1288–1294 (10th Cir. 2003) (affirming the district court dismissal on remand from *Davis* v. *United States*, 192 F.3d 951 (10th Cir. 1999)). Respondent also cites three cases supposedly demonstrating the flexibility of the Rule 19(b) inquiry in the face of state sovereignty. Again, the decisions do not support respondent's broad assertion. In one, the court expressly declined to reach Rule 19(b) after the indispensability issue was mooted by the court's determination that Massachusetts could not assert Eleventh Amendment immunity. *Hudson Savings Bank* v. *Austin*, 479 F.3d 102, 109–110 (1st Cir. 2007). The other two involved the unusual circumstance where Massachusetts and the United States were adverse, each sovereign asserted immunity in the other's court, and the United States, whose claim had priority, sought continuation of the suit in federal court. *GE Capital Mortgage Servs., Inc.* v. *Estate of Lugo*, 319 F. Supp. 2d 127, 134 & n.43 (D. Mass. 2004); *Horizon Bank & Trust* v. *Flaherty*, 309 F. Supp. 2d 178, 195–196 (D. Mass.), *appeal dismissed as moot*, 391 F.3d 48 (1st Cir. 2004).

Merrill, meanwhile, would have the courts treat immunity as wholly irrelevant in interpleader cases. In its view, a foreign government may either waive its sovereign immunity and participate in the proceeding or suffer whatever consequences flow from the decision to remain on the sidelines. See Merrill Br. 22, 23–24 ("for purposes of the balancing of the equities required under Rule 19(b), PCGG is no different from a private non-intervening litigant"). But as we have explained, and as Merrill nowhere denies, this argument cannot be squared with contrary decisions of this Court or of the courts of appeals, with scholarly commentary, or with the principles that underlie the immunity doctrine. See Pet. Br. 27–34.[4]

Merrill also argues that the impact of this action on the Republic's immunity is of no moment because, as the Republic ultimately will have to waive its immunity to seek the Arelma assets through litigation in the United States, requiring participation in *this* litigation affects only the "PCGG's right to choose the time and the venue to waive [immunity] and pursue affirmative litigation." Merrill Br. 21. That contention misunderstands the nature of sovereign immunity. A fundamental aspect of the sovereign's immunity is its right to determine *when and on what terms* it will submit to suit. See, *e.g.*, *Hercules Inc.* v. *United States*, 516 U.S. 417, 422 (1996); *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994); *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 307 (1990). And the Republic's exercise of that authority here was hardly capricious: it sought to protect an

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[4] Merrill notes the "proliferation of investments by foreign entities." Merrill Br. 16. But such investments would fall under the commercial activities exception to the FSIA and therefore could not raise the issue presented here.

essential sovereign interest by ensuring that *its* courts would be the first to determine ownership of assets that (it believes) were stolen within *its* territory by *its* former President during his time in office.[5]

It is no answer to this point to maintain, as do respondent and Merrill, that dismissal in circumstances like those here would give a sovereign that has a substantial interest in disputed assets a "preemptive veto" over U.S. litigation. Merrill Br. 22; see Resp. Br. 50–51. After all, such a "veto" is not unique to litigation involving sovereigns; it is a consequence of Rule 19, which frequently requires dismissal of suits even when it is a non-sovereign that cannot be joined. Moreover, dismissal of claims often is a *necessary* consequence of sovereign immunity, which may leave parties who hold even indisputably meritorious claims without a remedy.

Most important, the point of the Republic's assertion of immunity here was simply to protect the right of Philippine courts to resolve, in the first instance, the ownership of the Arelma assets as between the Republic and the estate of its former President. Assuming that the Republic prevails in that litigation, it will take whatever steps are required to secure the Arelma assets, including possible litigation in this country. Thus, dismissal here will not leave those assets in limbo indefinitely.

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[5] For this reason, respondent's observation that the Republic chose to participate as a plaintiff in other U.S. litigation (Resp. Br. 6)—principally in an effort to freeze Marcos assets to prevent their dissipation—has no bearing on its decision *not* to waive its immunity as a defendant in this action.

C. The Factors Identified In Rule 19(b) All Support Dismissal Of This Action.

Even if sovereign immunity itself were not considered a "compelling" interest within the meaning of *Provident*, the various factors specified in Rule 19(b) would mandate dismissal here. In arguing to the contrary, respondent and his *amici* have abandoned important aspects of the Ninth Circuit's reasoning. Their substitute rationales, however, are no more persuasive.[6]

1. Further litigation will prejudice the Republic's interests.

As we explain in our opening brief (at 37–42), the prejudice to the Republic caused by the judgment in this case is manifest. There can be no denying the Republic's strong claim to the Arelma assets. See *id.* at 25 n.10.[7] And while respondent is correct in not-

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[6] As respondent acknowledges, the Ninth Circuit did not apply an abuse of discretion standard in affirming the district court. Resp. Br. 38. In any event, application of such a standard now would not save the holdings below; "[i]ntelligent exercise of 'judgmental discretion' [is] not possible" when, as in this case, "the district court misread the rule." *Cloverleaf Standardbred Owners Ass'n* v. *Nat'l Bank of Wash.*, 699 F.2d 1274, 1277 (D.C. Cir. 1983) (R. Ginsburg, J., joined by Scalia, J.).

[7] Respondent repeats the district court's statement that there is no evidence supporting the Republic's claim to ownership of the Arelma assets. Resp. Br. 5, 6–7. This contention cannot be advanced seriously. The Swiss Federal Supreme Court found no doubt that the Marcos Swiss assets, including Arelma, had an illegal provenance. See Pet. Br. 4. And the Philippine Supreme Court determined that, during the period 1966–1985, Ferdinand and Imelda Marcos had an aggregate income of $304,372.43 (*Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154, at 38 (Phil. July 15, 2003)); to say the least, this finding makes it doubtful that Ferdinand Marcos

ing that the Republic would not be bound by the interpleader judgment (Resp. Br. 42), that is beside the point; the court of appeals recognized (Pet. App. 8a–9a) and Merrill concedes that the assets will be dissipated beyond recovery as a practical matter if they are disbursed to the plaintiff class.

In the face of this reality, respondent makes only one serious argument regarding the first Rule 19(b) consideration: he contends that the Republic would not prevail if it brought suit against Merrill to assert ownership of the assets. As we explain in our opening brief (at 34–36), however, the strength of the absent party's claim on the merits is not relevant to the Rule 19(b) inquiry, and the United States shows (at U.S. Br. 23–24) that this rule must apply with special force when the absent party is a sovereign.[8] In response, Merrill contends (Merrill Br. 20) that making an inquiry into the merits a part of the Rule 19(b) determination would be analogous to courts "conduct[ing] basic factfinding in determining their jurisdiction." Such an inquiry here, however, would be neither jurisdictional nor (as it would essentially require resolution of the legal claim on the merits) "basic."

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had legitimate sources for the $2 million used to capitalize Arelma in 1972.

[8] Respondent asserts that the Ninth Circuit "*did not evaluate the merits of the Republic's asserted claim*, but instead *assumed the validity of the claim* and determined that even if it were valid the Republic was barred by the statute of limitations from pursuing its claim." Resp. Br. 39–40 n.19 (emphasis in original). But dismissal on statute of limitations grounds *is* a judgment on the merits. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).

Although that is enough to resolve the matter, respondent and Merrill are wrong even on their own terms because the Republic's suit against Merrill to recover the Arelma assets *could* succeed. Respondent and Merrill have largely abandoned the Ninth Circuit's rationale on this point (that a suit against Merrill would be barred by the New York statute of limitations governing cases of public corruption), and for good reason: a suit against Merrill self-evidently would be premised, not on misappropriation of public funds, but on Merrill's failure to surrender the assets to their true owner. As to this, Merrill contends that an action on such a claim would be barred by New York's six-year statute of limitations for breach of contract, which (it contends) began to run in 2000 when Merrill declined to transfer the Arelma assets to PNB pending the Sandiganbayan's decision. But for several reasons, this contention, too, is incorrect.

First, it seems most unlikely that the limitations period for breach of contract began to run in 2000. Merrill's refusal to transfer the funds at that time was not a repudiation of the agreement; Merrill declared, instead, only that it was awaiting a ruling by the Sandiganbayan and would be prepared to surrender the assets to the owner at that time. Compare, *e.g.*, *Computer Possibilities Unlimited, Inc.* v. *Mobil Oil Corp.*. 747 N.Y.S.2d 468, 476 (App. Div. 2002). A completed breach triggering the running of the statute of limitations presumably would not occur unless and until Merrill definitively refuses to transfer the funds *after* the Sandiganbayan rules. At that time, the Republic might be able to bring an action against Merrill not only for breach of contract, but also for conversion on the theory that the Republic perfected its legal right to the assets only upon the (presumably favorable) ruling of the Sandigan-

bayan. See N.Y. C.P.L.R. § 206(a) (where demand for money is necessary to start the running of the statute of limitations, limitations period begins "when the person having the right to make the demand discovered the facts upon which the right depends").[9]

Second, if the Republic prevails before the Sandiganbayan it may seek to enforce that judgment in New York. Merrill insists (Br. 28) that such an action would be precluded by N.Y. C.P.L.R. § 5303. But even if that statute would not *require* the enforcement of the Sandiganbayan judgment, its remedy is not exclusive. As the practice commentary to Section 5301 explains:

> Article 53 is really a showpiece for foreign tribunals: it occupies the CPLR more to assist a New York judgment in gaining recognition abroad than to assist a foreign judgment seeking recognition here. So liberal has New York caselaw been in the recognition of the judgments of foreign nations, in fact, that the occasion for the use of Article 53 has been rare. It has therefore received "scant judicial attention."

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[9] Merrill argues that the Republic could not assert control of the assets through Arelma (after, hypothetically, being awarded the Arelma shares by the Sandiganbayan) because Arelma's rights "were adequately protected in the interpleader by Arelma's participation in the interpleader action." Merrill Br. 27. This is a perplexing statement. If this Court reverses the Ninth Circuit's judgment, the interpleader will be set aside. At that point, whoever comes to control Arelma's shares will be entitled to instruct Arelma to enforce its contract with Merrill. It is not apparent what bearing Arelma's participation in the failed interpleader could have on the matter.

N.Y. C.P.L.R. § 5301 practice commentary (1997) (quoting *Overmyer* v. *Eliot Realty*, 371 N.Y.S.2d 246, 255 (Sup. Ct. 1975)).

As a more general matter, New York courts have indicated that, "[u]nder principles of comity, our courts should give full effect to a judgment rendered by a [foreign] court of competent jurisdiction." *Watts* v. *Swiss Bank Corp.*, 264 N.Y.S.2d 667, 668 (App. Div. 1965) (per curiam). Because it is conceded that the Philippine courts have jurisdiction to resolve ownership of the Arelma shares—and because there is no reason to doubt that ownership of the shares will determine what happens to the Arelma assets[10]—the judgment of the Sandiganbayan likely will be enforceable against Merrill in New York.

Third, as the United States notes (U.S. Br. 27 & 29 n.5) and as Merrill recognizes (Merrill Br. 24, 29), 28 U.S.C. § 2467 provides a mechanism for the Attorney General to seek enforcement of a foreign judgment of forfeiture regarding assets located in the United States. There is no obvious reason, and Merrill has not suggested one, why the Attorney General would not initiate such a proceeding here if the Philippine courts rule for the Republic. Such assistance seems likely, given the United States' strong support for international anti-corruption policies and the United States' commitment in the MLAT to as-

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[10] It may be true that an individual shareholder does not directly own the corporation's assets (see Merrill Br. 4 n.5), but "all the shareholders of a solvent corporation by unanimous consent may make any disposition of the company assets that they desire." W.M. Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 2651 (2007). Under this principle, the owner of the two Arelma shares will have the ability to dispose of the corporate assets.

sist the Republic in proceedings related to asset forfeiture. See U.S. Br. 27.

Having said all this, the complexity of these various arguments illustrates why courts would do well to avoid examination of the merits when making the Rule 19(b) inquiry, lest they be caught up in difficult and distracting collateral litigation. But if consideration of the merits is proper at all in this context, the party seeking dismissal surely need not show to a certainty that it would prevail Instead, as the United States explains (26–27), it should be enough to demonstrate that the possibility of the absent party's success cannot be categorically excluded. The Republic has made such a showing here; the Ninth Circuit and respondent are wrong in asserting that the Republic has "no practical likelihood of obtaining the Arelma assets." Pet. App. 10a. The first Rule 19(b) factor therefore decisively favors the Republic.

2. The judgment could not be structured to protect the Republic's interest.

The second Rule 19(b) factor, which asks whether the judgment could be structured to protect the absent party, points the same way. In fact, as we explain in our opening brief (at 42–43), a case where several claimants assert mutually exclusive ownership of a common fund is the paradigm of one where absent parties necessarily will be prejudiced. See also U.S. Br. 29. Respondent and his *amici*, who do not mention this consideration, appear to concede the point.

Merrill does suggest that interpleader effectively functions as an "invitation for all potential claimants to appear and press their case" and that in this regard "PCGG is no different from a private non-

intervening litigant that chose not to participate in the interpleader." Merrill Br. 22–23. But this contention has matters backwards. The danger of prejudice to any absent party, sovereign or not, is particularly acute in the interpleader setting because such a proceeding is intended to settle which of several claimants own a single asset. See Pet. Br. 41–42. And the "invitation" to the absent sovereign to participate that is contemplated by Merrill hardly is an adequate solution to that problem, as it would require surrender of the sovereign's immunity as the price for avoiding prejudice—the very outcome that this and other courts consistently have rejected. For this reason, the United States is correct in noting the likelihood "that an immune sovereign will almost always be entitled to dismissal under Rule 19(b) in an interpleader action such as this." U.S. Br. 29–30.

3. The judgment here is not "adequate."

As for the third Rule 19(b) factor, respondent also makes no serious attempt to defend the Ninth Circuit's holding that resolution of the interpleader would be "adequate" because that judgment would provide some recovery for the plaintiff class members. Instead, respondent now contends that the judgment is adequate because *Merrill* is satisfied with it. Resp. Br. 42–43. But that is hardly dispositive. The adequacy consideration looks to "the interest of *the courts and the public* in complete, consistent, and efficient settlement of controversies." *Provident*, 390 U.S. at 111 (emphasis added). That sort of "complete" resolution would be impossible here in the Republic's absence, for all agree that, at a minimum, the Republic still would be entitled to bring an action against Merrill. While Merrill may believe that such an action is improbable because it

would be unlikely to prevail, the Republic does not share that view.

In fact, the most efficient way to resolve ownership of the Arelma assets, and the only way to accomplish that goal in a single proceeding, is through dismissal of this action under Rule 19(b). Merrill is wrong in suggesting that it would face multiple suits in the event of dismissal here. To the contrary, if this Court holds that the Republic is indispensable and that the Arelma litigation may not proceed in the Republic's absence, *all* parties who participated in this action would be bound by that judgment. See 18A C. Wright *et al.*, *Federal Practice and Procedure* §§ 4435, 4438 (3d ed. 2001) ("such dismissals generally preclude relitigation of the underlying issue of * * * party joinder"; "issue preclusion should defeat any effort to relitigate the same joinder issue in a second action"). That would make it impossible for other parties to bring claims against Merrill for the Arelma funds without the participation of the Republic. And if the Republic brings an action against Merrill after a favorable ruling of the Sandiganbayan—as Merrill contends the Republic will have to do to obtain the Arelma assets—all other claimants could be joined in that action and bound by that judgment on the merits, thus satisfying the "public stake in settling disputes by wholes." *Provident*, 390 U.S. at 111.

4. Respondent and his amici *are not prejudiced by the unavailability of a forum.*

The fourth listed Rule 19(b) factor asks whether "the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Although respon-

dent complains that he has no "adequate" alternative forum open to him (Resp. Br. 40),[11] we showed in our opening brief (at 45–46) that dismissal would be warranted here even if that were so because (1) respondent's claims do not arise until *after* resolution of the dispute between the Republic and the Marcos estate, making respondent's search for a forum premature; and (2) the lack of a forum in the United States is an unexceptional consequence of the Republic's sovereign immunity. Respondent disregards these points. In any event, respondent's premise is incorrect because he *does* have a forum available in the Philippines: Philippine law entitles him to seek to intervene before the Sandiganbayan,[12] and human rights claimants have in fact filed a motion to intervene in other proceedings before that court. See *Ortigas & Co.* v. *PCGG*, Case Nos. 93, 97 (Phil. Sandiganbayan Nov. 29, 2007) (complaint-in-intervention). As we have noted (at 9, *supra*), such an overseas forum may be fully adequate for Rule 19(b) purposes.

Merrill also complains that there is no forum in this country in which it may bring suit to resolve all competing claims to the Arelma assets. If so, this,

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[11] Merrill argues that *it*, and not respondent, is the relevant "plaintiff" for purposes of this Rule 19 inquiry. Merrill Br. 13–14. We need not choose sides in this argument, however, because this Rule 19(b) consideration favors *neither* respondent nor Merrill.

[12] Phil. R. Civ. P. 19(1), which applies to the Sandiganbayan (see Rep. Act. No. 7975, § 4 (Phil. Mar. 30, 1995)), authorizes intervention by "[a] person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court."

too, is a consequence of the Republic's immunity. But it also bears emphasis that Merrill faces no real prejudice from the lack of a forum to hear its interpleader suit. As explained above, because all other claimants would be bound by a judgment of this Court dismissing this action under Rule 19(b), there is no danger that Merrill will be held liable pending resolution of the Sandiganbayan proceeding. As a stakeholder with no claim of its own to the assets, that preclusion of further litigation would fully protect Merrill's interest. After the Sandiganbayan's ruling, entitlement to the Arelma assets could be settled in a single proceeding by a U.S. court, which is precisely the outcome Merrill seeks. In this context, the balance of equities favors, not a stakeholder that faces no liability and need only continue to sit on disputed assets (as it already has for more than thirty years) until a proceeding to settle ownership is commenced in this country, but the sovereign whose substantial claim to stolen assets will be overborne if the interpleader goes to judgment.

5. Additional "compelling substantive interests" favor dismissal of this suit.

Other considerations also powerfully support dismissal of this action. *First*, respondent and his *amici* do not deny the Republic's substantial interest in having its own courts pass judgment on former President Marcos's misconduct, including his misappropriation of the Arelma funds. That consideration cuts against allowing disposition of the assets in this country prior to the ruling of the Sandiganbayan. Respondent and Merrill nevertheless assert that the Republic has been dilatory in pursuing the Arelma funds. Resp. Br. 5–6, 44–45, 54; Merrill Br. 2–3. But that simply is not so. Immediately following the

overthrow of the Marcos regime, the Republic sought the assistance of other nations, including Switzerland and the United States, in the massive undertaking of identifying and freezing the Marcos properties. In 1991, the Republic commenced forfeiture proceedings against the Marcos estate in the Sandiganbayan, while pursuing efforts throughout the 1990s to obtain return of Marcos assets to the Philippines. See Pet. Br. 4. In 2003, in holding the Swiss assets forfeit, the Philippine Supreme Court emphasized that the delay in resolving these cases was largely attributable to the obstructive litigation tactics pursued by the Marcos estate in jurisdictions around the world. *Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154, at 10 (Nov. 18, 2003) (on denial of reconsideration) (emphasis in original) ("It would be readily apparent to a reasonable mind that respondent Marcoses have been deliberately resorting to every procedural device to delay the resolution hereof. * * * *The respondent Marcoses cannot deny that the delays in this case have all been made at their instance. The records can testify to this incontrovertible fact.*").

It is true that the current motion before the Sandiganbayan regarding Arelma—which was filed after the Philippine Supreme Court's forfeiture decision to confirm that ruling's application to the Arelma assets—has been pending for a significant period. But that delay cannot be attributed to lack of zeal on the part of the Republic's enforcement authorities, who have moved the Sandiganbayan on five occasions (beginning on May 15, 2005, and most recently on Nov. 16, 2007) to expedite its decision. See *Republic of the Philippines* v. *Marcos*, Case No. 141 (Phil. Sandiganbayan Nov. 16, 2007) (Urgent Manifestation and Motion) (noting Republic's "man-

dated duty to recover at the soonest possible time ill gotten wealth that ought to revert to the Filipino people"). The Sandiganbayan itself has a very substantial caseload, including matters such as the corruption proceedings involving former President Joseph Estrada; last year it disposed of more than 600 cases. *28th Annual Report of the Sandiganbayan, Calendar Year 2006*, at 16.

Second, Merrill is wrong in labeling irrelevant U.S. and international anti-corruption policies that favor return of misappropriated assets to the country of origin. The United States, as a party to the U.N. Convention Against Corruption, is committed by U.S. law to return stolen assets and to "take such measures as may be necessary to permit its competent authorities" to assist other nations in implementing confiscation orders. See Pet. Br. 50. And as the Swiss Federal Supreme Court has explained, application of this principle means that ownership of the Arelma assets must be settled in the Philippines, where respondent must either "participate in the probate proceedings" or "claim damages from the Philippine government." See Pet. Br. 51. U.S. policy and that of other interested nations such as Switzerland therefore favors resolution of this dispute in the Philippines, while the contrary conclusion of the court below threatens to interfere with broader international anti-corruption efforts. That surely is a "compelling" reason to dismiss this action.

Third, respondent's characterization of the issue here—that the Republic "seeks to deprive [human rights victims] of compensation for their mistreatment" and is asking for a rule "that effectively forecloses the ability of victims of human rights abuses ever to collect on their judgments" (Resp. Br. 1, 55)—

fundamentally misstates the nature of this case. With the *support* of the Republic (see Resp. Br. 2, RA1–RA11), respondent and a class of human rights claimants obtained a judgment against the Marcos estate, and the Republic has no objection to respondent's efforts to collect on that judgment *from the estate*. But respondent has no judgment *against the Republic*. If the assets in dispute here belong to the Republic, respondent has no more claim to them than he does to assets of the United States or Merrill. The question in this case, which must be answered *before* respondent may assert a claim against these assets, therefore is whether they in fact belong to the Republic rather than the Marcos estate. That question is now before the Sandiganbayan and should be answered in the Philippines.

The reality is that the Republic has used the substantial assets already recovered from former President Marcos to accomplish the greatest good for the greatest number of its citizens. In accord with Philippine law and the policy choices made by the first democratic government after the overthrow of the Marcos regime, the Republic has, to date, devoted more than $650 million recovered from the Marcos Swiss assets to agrarian development that was neglected during the Marcos era and that is crucial to the well-being of the Philippine people. See Pet. Br. 49 n.19. The Republic also has made efforts to help the individual victims of the Marcos government. It twice approved undertakings to use recovered assets to assist those victims directly, although these efforts were disapproved by the Philippine courts. See *Republic of the Philippines* v. *Marcos*, Case No. 141 (Phil. Sandiganbayan July 27, 1999) (order). And compensation legislation to assist those victims currently is pending in the Philippine Con-

gress.[13] But whatever the proper outcome of these efforts, they involve a matter that is properly resolved in the Philippines by the Philippine people and their government. Courts of the United States, through manipulation of the "equitable" principles of Rule 19, have no role to play in the internal domestic affairs of allied nations.

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[13] Phil. House Bill No. 921 (approved by the House Committee on Appropriations); Phil. Sen. Bill No. 1532 (approved on third reading by the Senate).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2008